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Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-477.

RICHARD E. GERSTEIN,
STATE ATTORNEY
FOR THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY,
PETITIONER,

v.

ROBERT PUGH AND NATHANIEL HENDERSON,
ON THEIR OWN BEHALF
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND
THOMAS TURNER AND GARY FAULK,
ON THEIR OWN BEHALF
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

Brief of the Commonwealth of Massachusetts as Amicus Curiae.

ROBERT H. QUINN,
Attorney General,
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division,
DAVID A. MILLS,
Assistant Attorney General,
Chief, Criminal Appellate Section,
BARBARA A. H. SMITH,
Assistant Attorney General,
MICHAEL C. DONAHUE,
Deputy Assistant Attorney General.

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Supreme Court of the United States.

October Term, 1954.

No. 73-477.

RICHARD E. GERSTEIN,
State Attorney
of the
Eleventh Judicial Circuit of Florida,
in and for Dade County,
Petitioner,
v.
ROBERT PUGH and NATHANIEL HENDERSON,
and on behalf of all others similarly situated, and
THOMAS TURNER and GARY FAULK,
on their own behalf
and on behalf of all others similarly situated,
Respondents.

on writ of certiorari to
the United States Court of Appeals
for the Fifth Circuit.

Brief of the Commonwealth of Massachusetts as AMICUS CURIAE.

Interest of Amicus Curiae.

Although the Commonwealth of Massachusetts does not initiate criminal proceedings by information, the Commonwealth files this brief as *amicus curiae* in compliance with the request of the Court.

Summary of Argument.

I. The Constitution was adopted as a federal system in response to the failure of the Articles of Confederation. The defenders of the Constitution specifically noted that the Constitution was a compromise document, providing not for a consolidated national government, but, rather, for a system of "coequal sovereignties" under which the states would be allowed sovereignty in areas particularly inappropriate to the national government.

This Court has long recognized the compromise which resulted in the adoption of the Constitution. The Supreme Court has embraced "Our Federalism" and has delineated specific doctrines to avoid federal encroachment in matters peculiarly appropriate to state decision. The doctrines have been described under the broad label of "Abstention" but the "Abstention Doctrines" are many and varied. The particular doctrine applicable to the instant case is the doctrine of "Equitable Restraint."

The doctrine of equitable restraint, as articulated in a series of decisions culminating in *Younger* v. *Harris*, 401 U.S. 37 (1971), means basically that the federal courts should refuse to intervene in pending state criminal proceedings when the state courts provide an adequate vehicle for the presentation of federal claims. Since notions of federal-state comity interact with traditional equity requirements, the doctrine of equitable restraint requires the

federal courts to consider the state's interest in making a state decision on the question as well as the potential of irreparable harm to the state defendant.

In the instant case, the State of Florida has a pending criminal proceeding against the respondents. Further it would appear that Florida provides a vehicle for the respondent to assert the federal constitutional claim, the courts below were in error when they issued injunctive and declaratory relief.

II. Preliminary probable cause hearings for defendants held in state custody are not required by the Fourth and Fourteenth Amendments to the United States Constitution where prosecution is initiated either by information or indictment.

This Court having held that prosecution by information is constitutionally permissible and having treated informations as comparable to indictment, the lower court has erred in applying probable cause standards required in prosecutions upon complaint to prosecutions by informations.

The sworn information, like the indictment, sufficiently complies with the Fourth Amendment requirement that probable cause must be shown before a warrant shall issue.

Argument.

I. The Concept of Federalism and the Doctrine of Equitable Restraint Require that the Federal Courts Defer to the Courts of the State of Florida in the Presentation of the Respondents' Claim. Younger v. Harris, 401 U.S. 37 (1971), and the Cases Decided under its Principles Bar Respondents' Claim.

The difficulty in defining the proper roles of the state and federal systems is a problem that has been present in the American concept of the function of its governments since

the adoption of the Articles of Confederation. In *The Federalist,* Nos. 18, 19, and 20, James Madison and Alexander Hamilton sketched an analysis of the historical failure of confederacies. In *The Federalist,* No. 20, they wrote that the lesson of history was ". . . that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity." Neither Madison nor Hamilton perceived a federal government coextensive with a great part of the North American continent. They could not have imagined a federal union encompassing fifty states, nor the complexity such a union inherently portended. The Constitution they drafted was designed to cure the defects of the Articles of Confederation by creating a viable central government strong enough to secure the national interest. That the creation of such a national government would inevitably diminish local power was obvious, but, in the eighteenth century, the question was more confusing because the issues were so novel.

When Madison defended his constitution he was defending a conception of government which was revolutionary, not only in terms of the individual's relation to the state, but also with respect to the juxtaposition of power the Constitution established. Hamilton, Jay, Madison, and the Federalist members of the Constitutional Convention articulated a system of government which was virtually incomprehensible to the eighteenth century political mind. This school of thought, which it is convenient to call Antifederalist, saw the question of federal and state power as one of either consolidation or confederation. Wood, *The Creation of the American Republic, 1776-1787* (1969) (hereinafter cited as Wood).[1]

[1] The quotations which appear in the following paragraphs are, except where specifically noted, taken from Gordon S. Wood, *The Creation of the American Republic, 1776-1787,* University of North Carolina Press, 1969. Professor Wood's work is a survey of the Articles of Confederation, the making of the Constitution, and, in general, political thought from the Revolution to the Constitution. All quotations are from what the author designates as primary sources, *e.g.,* Jonathan Eliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution.* (Washington, 1854). See Wood, *supra,* 619-620 (A Note on Sources).

The quotations are not intended to be a definitive historical analysis but are cited with the intention that the thoughts of some of the Founding Fathers may be useful in placing "Our Federalism" in its proper perspective.

The eminent Virginian, George Mason, warned of the Constitution that ". . . [t]hese two concurrent powers cannot exist long together, the one will destroy the other." James Winthrop: "We shall find it impossible to please two masters." Logic seemed to require either a national government or the separate state governments to exercise absolute sovereignty in their spheres. "I have never heard," said William Grayson, "of two supreme co-ordinate powers in one and the same country before. I cannot conceive how it can happen. It surpasses everything that I have read of concerning other governments, or that I can conceive by the utmost exertions of my faculties."

The most democratic of the revolutionaries of 1776 balked at a constitution which they regarded as intending to eradicate state power. Samuel Adams said of the Convention: "I confess, as I enter the Building, I stumble at the threshold. I meet with a National Government, instead of a Federal Union of Sovereign States." Perhaps William Lenoir of North Carolina placed the Antifederalist arguments in their clearest modern perspective. "Instead of securing the sovereignty of the states," the constitution ". . . is calculated to melt them down into one solid empire." Lenoir's empire would be oppressive because ". . . no extensive empire can be governed upon republican

principles, and that such a government will degenerate to a despotism, unless it be made up of a confederacy of small states, each having the full powers of internal regulation." To Lenoir, and the Antifederalists, different states meant different interests, different climates, different habits, different needs, requiring different laws and different regulations. Wood, *supra,* 525-527.

The result of the Antifederalist reaction to the adoption of a new constitution was to force a balance which Madison said was a constitution ". . . not completely consolidated, nor is it entirely federal." It was, said Madison, "of a mixed nature" made up "of many coequal sovereignties." In retrospect, perhaps, "coequal sovereignties" may be confused with the "sovereignty over sovereigns" that Madison had condemned in *The Federalist,* No. 20, but the conclusion is unnecessary because what the Federalists had created was a living, vibrant document: a written Constitution in which power and the perogatives of the sovereign itself were distributed and balanced not only for the eighteenth century but for as long as this balance served the needs and liberties of the people.

The allocation of power which the Constitution effected was the key to its survival. If the structure, if its allocation of power was sound, the document would endure. If the divisions of federal power were unsound or if state perogatives were recklessly abused, the Constitution was unlikely to prove a viable instrument of government. The test would be in the flexibility of the document itself.

> "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct

> sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE." Hamilton, *The Federalist,* Number 82.

Thirty years after Hamilton wrote the Federalist papers a Supreme Court Justice appointed to the court by James Madison wrote on the subject of the powers granted by the Constitution:

> "The constitution, unavoidably, deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself." *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326 (1816) (Story, J.)

Power was the essential subject of the Constitution. Who should possess it and how it should be used were questions that the Founding Fathers sought to answer. Containing the flexibility noted by both Hamilton and Justice Story, the Constitution endured precisely because

it embodied "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

This Court has long recognized that one of the primary concerns of "Our Federalism" is the ". . . independence and integrity of the state courts, their important role in our federal system, and except in the most extraordinary circumstances, their right to conduct proceedings free from federal court interference." See Carey, *Federal Court Intervention in State Criminal Prosecution*, 56 Mass. L.Q. 11 (1971). The interest of the states in the administration of their criminal law is obvious. Probably in no other context is the state interest likely to be as high as in an instance where the basis of the violation of the principles of federalism is the presumption that state official action to enforce its criminal laws is working a denial of a constitutional right. The premise of virtually all federal court interference with state action is conduct by an official or officials of a state which is alleged, in a federal forum, to constitute a violation of a federal right. When the right purportedly being violated is being violated in a state judicial proceeding, federal intervention calls into question the very integrity of the state process. By intervening, in any way, the federal court has acted upon the assumption that state judges will not enforce the United States Constitution, though their duty to do so differs in no way from their federal counterparts. Cf. *Robb* v. *Connolly*, 111 U.S. 624 (1884).

Since the decision in *Ex parte Young*, 209 U.S. 123 (1908), this Court has developed various theories designed

to mitigate the generally abrasive effect any federal intervention will have on state procedure.[2] In the instant case the respondents filed class actions in the federal court seeking declaratory and injunctive relief against their arrest and detention pursuant to the Florida information procedure. The respondents had been arrested and were incarcerated under Florida law. They then sought adjudication of a federal constitutional question concerning their right to a pretrial hearing on the issue of probable cause to arrest.

Beginning with *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943), this Court has addressed the question of when declaratory and injunctive relief may be appropriate to intervene in a state matter. After disposing of the jurisdictional question[3] Chief Justice Stone said, at 162-163:

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[2] See generally, Hart and Wechsler, *The Federal Courts and the Federal System* (2d Ed. 1973), 926-1056; Wright, *Handbook of the Law of the Federal Courts*, (2d Ed. 1970). See also, Kurland, *Toward A Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960); Wright, *The Abstention Doctrine Reconsidered*, 37 Tex. L. Rev. 815 (1959).

As will be presented in the text of the *Amicus* brief the specific doctrine of "Abstention" applicable to this case is quite narrow and the doctrine of *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), cited by the petitioner, is not on point, nor is the reference to 28 U.S.C. § 2283. See fn. 4, *infra*. Brief for Petitioner, p. 19.

[3] The question in cases where equitable relief is sought against a state court proceeding is not a jurisdictional one. If there is jurisdiction under 28 U.S.C. § 1343 whether relief is available under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 depends on what the dictates of comity and federalism are in a particular case. Chief Justice Stone, in *Douglas*, at 162:

> "Notwithstanding the authority of the district court, as a federal court, to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity. Want of equity jurisdiction, while not going to the power of the court to decide the cause, *Di Giovanni*

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the judiciary Article of the Constitution. Congress by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent."

The Chief Justice said it was a familiar rule that courts of equity ordinarily do not restrain criminal prosecutions. The imminence of the prosecution was not a ground for equitable relief since the state court as well as the federal court could determine the lawfulness or constitutionality of the statute in question:

"Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted." *Id.*, at 163.

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v. *Camden Ins. Assn.*, 296 U.S. 64, 69; *Pennsylvania* v. *Williams*, 294 U.S. 176, 181-82, may nevertheless, in the discretion of the court, be objected to on its own motion. *Twist* v. *Prairie Oil Co.*, 274 U.S. 684, 690; *Pennsylvania* v. *Williams*, *supra*, 185. Especially should it do so where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court."

The doctrine enunciated in *Douglas* has been termed "Equitable Restraint." Hart and Wechsler, *The Federal Courts and The Federal System* (2d Ed. 1973), 1009-1050. Since purely equitable considerations are not controlling, *Douglas* dealt with the broader question of federalism and the principle that ". . . notions of federal-state comity intersect traditional equity requirements in connection with the more inclusive requirement that the plaintiff in equity show irreparable harm, and more particularly in connection with equity's traditional reluctance to interfere with criminal proceedings unless such harm would result." Hart and Wechsler, *supra*, at 1010.

The *Douglas* doctrine of equitable restraint stood unquestioned until 1965 when *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), distinguished certain First Amendment questions which may be subject to a "chilling effect" when there is a threatened state prosecution. *Dombrowski* appeared to many to have modified the *Douglas* line of cases and in 1971 this Court decided a series of cases designed, it is suggested, to reaffirm the principles of the doctrine of equitable restraint. *Younger* v. *Harris*, *supra*, 401 U.S. 37; *Samuels* v. *Mackell*, 401 U.S. 66, *Perez* v. *Ledesma*, 401 U.S. 82, were all decided February 23, 1971, and are, in the view of at least one respected commentator, among the most significant cases affecting the law of the federal court decided in years. Wright, *Handbook of the Law of the Federal Courts* (2d Ed. 1970), Foreword to 1972 Pocket Part.

Younger dealt with the question whether, after *Dombrowski*, a federal court could issue an injunction to restrain a pending state criminal proceeding. The District Court, sitting with three judges pursuant to 28 U.S.C. § 2284, enjoined Younger, the District Attorney for Los Angeles

County, from enforcing the California Criminal Syndicalism Act and from further prosecution of the currently pending action against Harris. Younger appealed directly to this Court pursuant to 28 U.S.C. § 1253 and Justice Black writing for the Court[4] reversed the three-judge District Court. The Court held ". . . the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions." *Younger, supra,* at 53. Moreover, ". . . the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it. . . ." The failure of Harris ". . . to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief," bars federal intervention. *Id.,* at 54.

Samuels v. *Mackell, supra,* rested on the same foundation as *Younger,* holding that when declaratory relief is sought, the requirement of irreparable harm applicable to traditional equity actions must govern the propriety of federal intervention. There are at least two principles present in *Younger* and *Samuels,* which are specifically relevant to the instant cases.

1. There must be a *pending* state criminal prosecution for the doctrine to apply.

[4] In *Younger,* Justice Black wrote for a majority. Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall concurred in the result, because Harris had not alleged bad faith harassment. Mr. Justice Stewart, with whom Justice Harlan joined, concurred with the notation that the Court was specifically avoiding the question whether 28 U.S.C. § 2283 applied to a declaratory judgment or whether 42 U.S.C. § 1983 was an expressly authorized exception to the anti-injunction statute. Mr. Justice Douglas dissented.

In *Mitchum* v. *Foster,* 402 U.S. 941 (1971), the Court held 42 U.S.C. § 1983 was an expressly authorized exception to 28 U.S.C. § 2283.

2. If there is a pending state prosecution, the federal plaintiff must have an opportunity to present his federal claim during the course of the proceeding.

The Attorney General of Massachusetts, as *amicus curiae,* would suggest the *Younger-Samuels* rule must be absolute if the state's interest is to be respected. That is, where a state defendant may raise his federal claim in the state proceeding no federal intervention is justifiable to interfere with a pending state criminal action.

In the case at the bar the respondents were arrested and incarcerated. The State of Florida took custody of them under its criminal laws. From this it would appear undisputed that Florida had a pending prosecution against persons concerning whom the state attorney had filed informations certifying probable cause to arrest. The request for relief, however, was not directed at the statute under which the state defendants were being held. In this instance the federal claim was that a state procedure occurring between arrest and trial was inadequate. The Court of Appeals for the Fifth Circuit found this distinguishing feature sufficient to remove the case from the *Younger-Samuels* rule:

> "This court has declined to issue declaratory or injunctive relief interfering with pending or future state court prosecutions, unless the state statute under which the plaintiffs were being prosecuted was allegedly unconstitutional on its face. However, we have not declined to adjudicate federal questions properly presented merely because resolution of these questions would affect state procedures for handling criminal cases. Where, as here, the relief sought is not 'against any pending or future court proceedings *as such.*' *Younger* is inapplicable.

> "The relief sought by these plaintiffs was not against any state prosecution *as such* but only against the state's practice of considering the state attorney a sufficient judge of probable cause to hold arrestees until arraignment or trial. Simply declaring that the plaintiffs were entitled to pre-trial procedural rights, the District Court said that the plaintiffs should 'immediately be given a preliminary hearing to determine probable cause by a committing magistrate *unless their cases have been otherwise concluded.*" By recognizing that some plaintiffs' cases might have been concluded, the Court demonstrated that its declaration of pre-trial rights was not to impede the plaintiffs' prosecutions." *Pugh* v. *Rainwater*, 483 F. 2d 778, 781-782 (5th Cir. 1973) (emphasis in original, citations omitted).

The amicus curiae would respectfully suggest to the Court that the distinction between prosecutions and prosecutions "as such" is simply not tenable. The question is whether or not a state prosecution has commenced. In the instant case it clearly had. The Fifth Circuit's reliance on *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), is not well placed if only because *Fuentes* had nothing to do with a pending state criminal prosecution. The doctrine of equitable restraint that the *amicus curiae* submits as applicable to the present cases applies only to state criminal prosecutions and reaches no further. It is true as the Fifth Circuit implies that since the relief sought would not enjoin further prosecution of the statute under which the respondent was arrested the precise *Younger* situation does not exist. However, the Court ignored the fact that another situation covered by the *Younger* principle might exist.

In *Samuels* the request was for declaratory relief and even though there would be no interference with the state

proceeding until the declaratory judgment was issued the intrusive effect of the federal proceeding was seen as sufficient to require federal restraint. Indeed, in *Perez* v. *Ledesma, supra,* this Court reversed the District Court's grant of unjunctive relief which did not enjoin a prosecution, but which did order illegally seized materials returned to the state defendants and barred the use of the material at the state trial. Justice Black said this action was improper under the *Younger* doctrine because it ". . . would effectively stifle the then-pending state criminal prosecution." *Id.* at 84.

Justice Black then restated the basic *Younger* rule, at 85.

> "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."

In view of the above, the amicus curiae would suggest that it cannot be seriously contended that the injunctive relief granted below did not have exactly the same "intrusive" effect on the Florida prosecution condemned in *Perez.* Neither *Younger,* nor *Samuels,* nor *Perez,* nor *Steffel* v. *Thompson,* 415 U.S. , 94 S. Ct. 1209 (1974), made any distinction between state prosecutions and state prosecutions "as such." The question is, as characterized by Justice Black in *Younger,* at 44, ". . . a proper respect for state functions," and this respect must be paid to the state courts if the federal system is to have continuing vitality.

The *amicus curiae* would not, however, contend that federal intervention cannot occur where the state proceeding does not allow an individual to raise a federal constitution-

al claim. In the instant case there is from the opinions below a question whether Florida does provide any procedural vehicle for the presentation of the federal claim. Assuming, *arguendo,* that the Florida information procedure might be inadequate, a point that will be discussed below, it does not appear to the *amicus curiae* that Florida does not provide a means for one to raise the question of probable cause to arrest.

The Fifth Circuit in its *Pugh* v. *Rainwater* opinion said:

> "Arraignment is the first opportunity for a magistrate to inspect the state attorney's information setting forth the cause upon which the defendant was arrested." 483 F. 2d at 781.

The question occurs as to why the issue cannot be raised at this time. An examination of the brief for the respondents indicates that they do not affirmatively argue that the question may not be raised. Moreover, the Court of Appeals went even further on whether there was a means of raising the federal question. In a footnote to the sentence quoted above:

> "For purposes of this appeal, we *assume* that because Florida Statutes § 906.06 requires the state attorney to state the offense on the information form and § 906.07 says that 'the court, on motion, may order the prosecuting attorney to furnish a bill of particulars,' *the defendant could challenge the information for failure to show sufficient probable cause upon which to continue the prosecution.* Otherwise, the trial itself would present the first such opportunity for a probable cause challenge before a judicial officer. While bail hearings apparently are afforded even where the state prosecutes by information, there is no showing on this record that these hearings have ever been utilized to require the State Attorney to show probable cause for arresting as well as the reasons for setting bail at a particular level or for denying bail altogether." (Emphasis supplied.)

It must be suggested that if a proper reading of the doctrine of equitable restraint is as suggested by the *amicus curiae* the state defendant must first "set up and rely upon his defense in the state courts . . . unless it plainly appears that this course would not afford adequate protection." *Younger* v. *Harris, supra,* at 45, citing *Fenner* v. *Boykin,* 271 U.S. 240 (1926).

It is the function of the state of Florida to decide the legal question of probable cause. See *Beal* v. *Missouri Pacific Railroad,* 312 U.S. 45 (1941). Indeed, the doctrine of equitable restraint has been held to apply *a fortiori* where the request is to intervene piecemeal to try collateral issues in a criminal proceeding. Cf. *Stefanelli* v. *Minard,* 342 U.S. 117 (1951); Hart and Wechsler, *supra,* 1012. If Florida provides a means of raising the federal claim, as the Court of Appeals assumes, then federal intervention is barred.[5] The remedy a state provides in any particular

[5] It should also be noted that when the instant case was originally argued, counsel for the respondent admitted that a vehicle to test the question of probable cause existed:

> "The Chief Justice: The state mentioned a motion to dismiss as a method of testing probable cause once the information is filed. What do you think of that?
>
> "Well, I don't think so because the state's attorney can get around it." 42 L.W. 3550

It would appear to the *amicus curiae* that the question whether or not the state's attorney can "get around" the motion to dismiss is irrelevant to the question of equitable restraint.

instance may not be one specifically desired by an individual state defendant, but, if an adequate remedy is provided it precludes the federal court from intervention.

There is no question that in the wake of the Civil War it was a pervasive sense of nationalism which led to the adoption of the Civil Rights Act of 1871 and the Judiciary Act of 1875. See opinion of Mr. Justice Brennan in *Steffel* v. *Thompson, supra.* The *amicus curiae* would agree explicitly that the overriding import of this nationalist expansion was to the benefit of the country and the security of the liberties of the people. There comes a point, however, when one must question whether the system of federalism, of "coequal sovereignties," to quote Madison, is not being slighted. There is no basis to assume that any right secured by the Constitution of the United States will be sacrificed by allowing a state court to first hear questions bearing on that right. A proper respect for state functions dictates that the federal courts recognize that state judges owe the same duty and bear the same devotion to our Constitution as their federal brothers. That, in essence, is the rationale of the doctrine of equitable restraint.

II. There is No Constitutional Right to a Preliminary Hearing.

A. *The Information Procedure of the State of Florida Satisfies Due Process Standards as a Method of Initiating Criminal Proceedings.*

It is well settled that due process of law does not require that a state initiate criminal process by an indictment returned by a grand jury. *Hurtado* v. *California,* 110 U.S. 516 (1884); *Lem Woon* v. *Oregon,* 229 U.S. 586, 589 (1913).

Since 1790, lesser federal crimes have been prosecuted by information. Act of April 30, 1970, c. 9, § 3; 1 Stat. 119. Rule 7, Fed. R. Cr. P., provides for prosecution by information for offenses which are punishable by imprisonment for less than one year. Both Florida procedure and the federal rules provide that if an information is filed, a defendant's statutory right to a preliminary hearing will be vitiated. Rule 5, Fed. R. Cr. P. Historically, leave of court was required before an information could be filed. *United States* v. *Douglas,* 155 F. 2d 894 (7th Cir. 1946). However, in *Albrecht* v. *United States,* 273 U.S. 1 (1927), the Court indicated that the requirement that leave of court be obtained could be satisfied without verification or affidavits.

> "The United States Attorney, like the Attorney General or Solicitor General of England, may file an information under his oath of office; and, if he does so, his official oath may be accepted as sufficient to give verity to the allegations of the information." 273 U.S. at 6.

Subsequently, with the enactment of the Federal Rules of Criminal Procedure, Rule 7(a) made it unnecessary for leave of court to be obtained prior to the filing of an information. See *United States* v. *Hearne,* 6 F.R.D. 294 (D.C. Wis. 1946).

The procedure followed by Florida authorities is consistent with the Federal Rules. Fla. R. Cr. P., Rule 3:131, 3:140.

The lower federal courts have consistently held that the right to a preliminary hearing is procedural and that substantive and constitutional rights are not involved. *Scarbrough* v. *Dutton,* 393 F. 2d 6 (5th Cir. 1968); *Sciortino* v.

Zampano, 385 F. 2d 132 (2d Cir. 1967); *United States* v. *Luxenberg*, 374 F. 2d 241 (6th Cir. 1967); *Austin* v. *United States*, 408 F. 2d 808 (9th Cir. 1969).[6]

In *Rivera* v. *Government of the Virgin Islands*, 375 F. 2d 988 (3d Cir. 1967), the court stated: "Thus the filing of an information in the Virgin Islands is *the full equivalent of the presentment of an indictment by a grand jury* [citation omitted], just as it is in the United States district courts in those cases in which it is employed." 375 F. 2d at 990 (emphasis supplied).

Respondents and the Court of Appeals sought to distinguish the above-cited cases on the ground that the validity of the trial as affected by the lack of a preliminary hearing was the issue in those cases, while in the instant case, the respondents are attacking their pretrial detention as unconstitutional because they have not been granted a preliminary hearing.

The Commonwealth of Massachusetts, as *amicus curiae*, submits that the distinction is without merit. The basic question raised in the above-cited cases and the question presented in the instant case is: Whether a person held in state custody has a constitutional right to a preliminary hearing? Whether the Constitution mandates that such a hearing be provided is not, we submit, conditional on whether the question is raised prior to trial or after trial. Had the courts in these prior cases held that the defendants had been denied a constitutional right to a preliminary hearing, the result may well have been the same as in

[6] In the Commonwealth of Massachusetts, the Supreme Judicial Court has held that a defendant has no constitutional right to a preliminary or probable cause hearing, and that "the prosecutor may seek an indictment without such a hearing even after the defendant has been arrested." *Commonwealth* v. *Britt*, Mass. Adv. Sh. (192) 1443, 1447, 285 N.E. 2d 780.

Coleman v. *Alabama*, 399 U.S. 1, 11 (1970), where the Court held that, on the issue of relief, inquiry must be made as to whether the denial of counsel at the preliminary hearing was harmless error. Therefore, we submit that the only distinction between the above-cited cases and the instant case concerns itself with the relief to be granted and not the constitutional issue raised.

When confronted with cases raising the question whether preliminary hearings should be afforded to defendants in order to test the evidence supporting an indictment by a grand jury, the Supreme Court has equated the indictment with the information and refused to find a constitutional basis for granting a preliminary hearing.

> ". . . this Court has several times ruled that an indictment returned by a legally constituted nonbiased grand jury, *like an information drawn by a prosecutor*, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." (Emphasis supplied.) *Lawn* v. *United States*, 355 U.S. 339, 349 (1958).

This Court has consistently refused to require a series of mini-trials to test the sufficiency of the indictment or information.

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the

Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, *like an information drawn by the prosecutor,* if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States,* 350 U.S. 359, at 363 (1956) (emphasis supplied).

B. *The Issuance of a Warrant Pursuant to the Filing of an Information does Not Violate the Fourth Amendment.*

The Court below has held that the issuance of a warrant upon the filing of an information violates the Fourth and Fourteenth Amendments to the United States Constitution. The Court below has focused on the lack of judicial scrutiny of probable cause as the basis for its decision. However, when the information system is employed the requirements for probable cause differ much as they do under the grand jury system. The analysis by the Court in *Ocampo* v. *United States,* 234 U.S. 91 (1914), is on point.

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally . . . as being judicial in the proper sense. . . . A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. . . . In short, the function of determining that probable cause exists for the arrest of a person accused is only *quasi*-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal." 234 U.S. at 100.

The Court then held that the use of the information procedure which denied to an inhabitant of Manila a preliminary examination as to probable cause did not violate the prohibition of the Philippine Bill of Rights, § 5, "[t]hat no warrant shall issue, but upon probable cause, supported by oath or affirmation." 234 U.S. at 100.

The Court stated:

> "Here we find clear warrant for modifications of the practice and procedure; and since § 5 of the same act (quoted above) does not prescribe how 'probable cause' shall be determined, it is, in our opinion, as permissible for the local legislature to confide this duty to a prosecuting officer as to entrust it to a justice of the peace. Consequently, a preliminary investigation conducted by the prosecuting attorney . . . and upon which he files a sworn information against the party accused, is a sufficient compliance with the requirement 'that no warrant shall issue but upon probable cause, supported by oath or affirmation.'" 234 U.S. at 100-101.

The respondents and the Court below appear to equate the initiation of criminal proceedings by information with the initiation of criminal proceedings by complaint. The Commonwealth of Massachusetts, as *amicus curiae,* submits that the two procedures are not equatable and that Fourth Amendment requirements differ. The Fourth Amendment contains no rigid definition of probable cause.[7]

[7] Under the prescribed statutory forms of indictments as contained in Mass. Gen. Laws, c. 277, § 79, there is no requirement that the facts constituting probable cause be recited. Nor for a warrant based upon indictment to issue is there any requirement that the facts constituting probable cause be recited. *Commonwealth* v. *Baldassini,* 357 Mass. 670, 676-677 (1970).

A showing of probable cause appropriate to protect a defendant arrested upon an information need not, we submit, be the same as that required at the complaint stage because in the former instance the information is in general verified by the prosecutor's oath of office. Such an oath has been deemed to be of sufficient integrity to support the information. *Albrecht* v. *United States, supra.*

This Court has equated informations with an indictment. *Costello* v. *United States, supra; Lawn* v. *United States, supra.* And, for the purposes of rendition, the courts of several states have in fact equated informations with indictments.

> "There is no doubt that a charge of crime in this form [information] where it is legal according to the laws of a state though not technically an indictment and not mentioned in the law of Congress, comes within the meaning of the law and would, and should be so regarded for the purpose of extradition if properly made." *People ex rel. Lyman* v. *Smith,* 352 Ill. 496 (1933). See also *Morrison* v. *Dwyer,* 143 Iowa, 502 (1909); *People* v. *Stockwell,* 135 Mich. 341 (1904); *In re Van Sciever,* 42 Neb. 778 (1894); *In re Hooper,* 52 Wis. 699 (1881).

While the rendition issues involved in these cases are not on point, the analysis by the various courts does indicate that informations are analogous to an indictment, rather than to a complaint. Therefore, we submit that, like an indictment, no judicial scrutiny of probable cause is required before a warrant may issue on the information. Rather, as with an indictment, if the information is fair on its face, the warrant should issue upon the request of the government as a matter of course. *Ex parte United States,* 287 U.S. 241 (1932).

Moreover, the Federal Rules do not require more.

> "Upon request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment." Rule 9(a), Fed. R. Cr.

As *amicus curiae,* the Commonwealth of Massachusetts submits that the existence of probable cause may be presumed from the fact that prosecution is instituted by a state attorney "under oath stating his good faith." Fla. Cr. P. Rule 3:140(g); *Albrecht* v. *United States, supra.* An order for arrest based upon the filing of an information conforms to the requirements of the Fourth Amendment. *United States* v. *Funk,* 412 F. 2d 452 (8th Cir. 1969). Also, we submit, it is a fair assumption that an information would not be filed in the absence of a determination that evidence sufficient to put before a grand jury exists and that, in addition, there exists sufficient admissible evidence to prove the case beyond reasonable doubt at trial.[8]

Therefore, as *amicus curiae,* the Commonwealth of Massachusetts suggests that there is no constitutional mandate under the Fourth or Fourteenth Amendments to the United States Constitution which requires that a preliminary hearing be afforded to defendants who are prosecuted either by indictment or information. In reaching this conclusion, we respectfully direct the court's attention to the words of Mr. Chief Justice Burger in his dissenting opinion in *Coleman* v. *Alabama,* 399 U.S. 1, 23-24 (1969):

> "Constitutional interpretation is not an easy matter, but we should be especially cautious about sub-

[8] See *In re Rule 3: 131(b), Florida Rules of Criminal Procedure,* Per Curiam Opinion of the Supreme Court of Florida, filed February 15, 1974, 289 So. 2d 3.

stituting our own notions for those of the Framers. I heed Mr. Justice Black's recent admonition on 'the difference . . . between our Constitution as *written* by the Founders and an unwritten constitution to be formulated by judges according to their ideas of fairness on a case-by-case basis. *North Carolina* v. *Pearce*, 395 U.S. 711, 744 (1969) (separate opinion of Black, J.) (emphasis in original)."

Conclusion.

For the reasons stated above, the Commonwealth of Massachusetts, as *amicus curiae*, respectfully suggests that the decision of the lower court be reversed.

Respectfully submitted,

ROBERT H. QUINN,
Attorney General,

JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division,

DAVID A. MILLS,
Assistant Attorney General,
Chief, Criminal Appellate Section,

BARBARA A. H. SMITH,
Assistant Attorney General,

MICHAEL C. DONAHUE,
Deputy Assistant Attorney General.